Supreme Court, U.S.
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No: _____

In the
Supreme Court of the United States
October Term, 1993

W.R. GRACE AND COMPANY and
W.R. GRACE AND COMPANY-CONN.,
Petitioners,

v.

MDU RESOURCES GROUP, d/b/a
MONTANA DAKOTA UTILITIES CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners seek a writ of certiorari to review a decision of Eighth Circuit Court of Appeals reversing and remanding a judgment entered on a jury verdict following a lengthy trial of asbestos property damage claims. The following questions would be raised in this writ:

1. Does a federal court of appeals reviewing a judgment on a jury verdict violate the Seventh Amendment right to a jury trial and its prohibition on reexamination of facts tried by a jury when the court adopts the losing appellant's allegations as the factual foundation for reversal and remand?

2. Does a federal court of appeals exceed its jurisdictional limits under the Seventh Amendment and violate the harmless error statute, 28 U.S.C. § 2111, by reversing a judgment due to a single allegedly erroneous component of a jury instruction without considering the instructions and special verdict in their entirety, without attempting to harmonize the verdict, and without determining whether the alleged error was cured by the record as a whole?

3. Does a federal court of appeals exceed its authority as limited by the Seventh Amendment and violate 28 U.S.C. § 2111 by reversing a complex jury trial based on isolated evidentiary exclusions without determining that the alleged errors rendered the entire trial fundamentally unfair so that, in the context of the entire record, the jury verdict must be declared a nullity?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to the proceedings below are those listed in the caption on the cover of this petition.

W.R. Grace & Company is the parent corporation of W.R. Grace & Company-Conn. Grace's subsidiaries or partnerships, other than wholly owned operations, are: A-O Grace Kaustik, Boodin Partnership, Carbon Dioxide Slurry Systems LP, Grace Cocoa Associates LP, Grace Offshore Turnkey, Grace Ventures Partnership I & II, Healthcare Medical, Immunecare of Hollywood, Immunecare of Key West, Infusion Systems, New Bedford Infusioncare, Nippon Dearborn Kabushiki Kisha, North Suburban Dialysis, OB One & IVtoo, Palm Springs I.V. Care II, Paramount Coal Company, Pharmacy Direct, Primecare Home Health Services, Grace Specialty Chemicals Indonesia P.T., Pursue Gas Processing and Petrochemical Company, Quality Home Care Services of Watertown, NY, Sleep Diagnostic Associates, Sisters of Charity Home Health Care, and VNA-NMC Homecare Partnership.

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MDU RESOURCES GROUP, D/B/A MONTANA DAKOTA UTILITIES CO.,

Respondents.

Petition For a Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

W.R. Grace & Company and W.R. Grace & Company-Conn. respectfully petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the panel of the United States Court of Appeals for the Eighth Circuit sought to be reviewed was issued on January 27, 1994. It is reported at 14 F.3d 1274 (8th Cir. 1994) (Arnold, R., C.J.), and reprinted in Appendix ["A-_"] A-1-19. A petition for rehearing was filed with the Eight Circuit, but denied on March 24, 1994; Circuit Judges Bowman and Beam voted to grant the suggestion for rehearing *en banc*. [A-20].

The unpublished judgment of the United States District Court for the District of North Dakota was entered on July 9, 1992. The district court judgment, the jury's special verdicts, and relevant jury instructions are reprinted in the Lodging [L-1-9] filed herewith.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1), which provides for review of cases in the court of appeals "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. Under 28 U.S.C. § 2101(c), a writ of certiorari "intended to bring any judgment or decree in civil action ... before the Supreme Court for review shall be taken or applied for within ninety days after the entry of the such judgment or decree." *See also Sup. Ct. R. 13.1.* The ninety-day period commences from the date of a denial of petition for rehearing, or the entry of the subsequent judgment. *Id.* at 13.4. In this case, Grace filed a petition for rehearing which was denied on March 24, 1994. [A-20]. The judgment was entered on April 7, 1994. [A-21].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. III, § 2, Cl. 2. *Jurisdiction of Courts; Supreme Court, Original and Appellate Jurisdiction.*

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Const. Amend. VII. *Trial by jury in civil cases.*

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

28 U.S.C. § 2111. *Harmless Error.*

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

STATEMENT OF THE CASE

This is an appeal from an eight-week trial involving claims of asbestos property damage asserted by respondent MDU Resources Group, d/b/a Montana-Dakota Utilities Co. ("MDU"). A jury heard all the evidence, weighed all the arguments, and found petitioners W.R. Grace & Co. and W.R. Grace & Co.-Conn. (collectively "Grace") not liable on each one of MDU's four common law claims. The jury also answered a special interrogatory and found that MDU knew or should have known of sufficient facts to put it on notice of its alleged causes of action at least six years before filing suit thus barring this suit under the North Dakota statute of limitations. Based on those verdicts, the district court entered judgment for Grace. A panel of the Eighth Circuit reversed the entire judgment both as to liability and the statutory bar, based on its conclusion that one jury instruction was insufficient and two evidentiary rulings were improper. As the factual foundation for its opinion, the appellate court adopted vigorously contested allegations of the losing appellant MDU and reached factual conclusions inconsistent with the jury verdict. It remanded the case for a new trial on all issues.

I. *BACKGROUND*

In 1963, Grace purchased the assets of the Zonolite Company, a manufacturer of various building and construction materials including a brand of fireproofing called Monokote.[1]

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[1] Monokote was designed to prevent structural steel in commercial buildings from buckling and collapsing in a fire. It contained vermiculite, a gypsum binder, and approximately 10-15% chrysotile asbestos. When bonded to structural steel, Monokote formed a cementitious barrier that provided fireproofing protection

MDU installed Grace's Monokote fireproofing in 1967-68 during the original construction of its office building in Bismarck, North Dakota. The fireproofing was applied to the structural steel located above the suspended ceilings in the building. In June 1990, MDU filed this action against Grace alleging property damage caused by the asbestos in the fireproofing which it claimed had contaminated its building. Jurisdiction in the North Dakota federal district court was premised on diversity of citizenship of the parties pursuant to 28 U.S.C. § 1332.

In 1980, ten years before suit, MDU had received a report from the North Dakota Department of Health informing it of the presence of asbestos in its building's fireproofing, identifying potential health risks, and suggesting preventive measures. Prior to that time, the record evidence showed that MDU, by virtue of its many industrial and utilities operations, had long known of potential dangers associated with exposure to asbestos. On that evidence, Grace moved for summary judgment on the North Dakota six year statute of limitations for tort claims. *N.D. Cent. Code § 28-01-16.* The district court denied the motion finding that the evidence "create[d] a jury question as to when MDU knew or reasonably should have known facts giving rise to [the] cause of action."[2] It reasoned that knowledge of the

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for the useful life of the building. Such fireproofing systems were required by building codes for all major construction throughout the country.

[2] The district court relied on *Hebron Public School Dist. v. U.S. Gypsum Co.*, 475 N.W.2d 120, 126 (N.D. 1991) (the discovery rule applies to the N.D. Cent. Code § 28-01-16); *Id.*, 953 F.2d 398, 402 (8th Cir. 1992) (a claim of asbestos property damage accrued when the owner had knowledge of potential hazards and "discovered the

presence of asbestos, by itself, was not enough to trigger the statute, and that material issues existed which would allow a jury to find that MDU had sufficient knowledge of facts to constitute a cause of action in 1980 or possibly sometime later within the post-1984 limitation period .

Grace also moved for summary judgment on MDU's claims of liability, but that motion too was denied. The district court reasoned that, like the statute of limitations defense, MDU's liability theories raised genuine issues of material fact to be tried by a jury. Grace then moved for bifurcated proceedings. MDU opposed that motion and the district court denied it. Thus, both liability and statute of limitations issues were tried to the jury in a single proceeding. MDU sought damages in excess of $5 million; the trial lasted eight weeks.

II. *SUMMARY OF THE TRIAL*

Throughout the entire trial, MDU offered evidence to persuade the jury: 1) that Grace knew of health risks associated with asbestos in its products before the building was constructed in 1968; 2) that the Monokote fireproofing had "contaminated" its building by releasing asbestos fibers; and 3) that MDU was not aware of the alleged contamination until 1988, two years before it filed this suit. Grace presented contrary evidence to show: 1) that it had no knowledge that nonindustrial exposure to asbestos in its products caused any significant health risk; 2) that the Monokote fireproofing was not "contaminating" the building and its asbestos content did not pose a hazard to building occupants; and 3) that MDU was aware of sufficient facts to place it on notice before 1984

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existence of asbestos in the acoustical ceiling plaster").

of the causes of action that MDU alleged in its 1990 lawsuit. The district court judge, who had presided over similar trials, made numerous rulings on various motions and evidentiary objections. MDU entered 111 exhibits (plus numerous subparts) and Grace entered 249 exhibits. In the end, the jury received a wealth of exhibits and heard hundreds of hours of testimony from both plaintiff and defense witnesses on each one of MDU's claims and on Grace's defenses.

The case went to the jury on MDU's four common law counts of: negligence, strict liability, breach of implied warranty, and nuisance. [L-8]. The elements of each count were explained in a detailed set of jury instructions. As part of those instructions, MDU requested and the court issued an overall "Statement of the Case" instruction which explained MDU's claim that: "Monokote contaminated the building and damaged the property." [L-6]. With respect to the strict liability claim, the jury was specifically instructed to find whether MDU's claim of asbestos fiber release and property contamination made the Monokote defective and unreasonably dangerous. [L-9].

The Verdict Form required the jury to answer the following questions:

> 1) NEGLIGENCE: Was plaintiff injured by any negligence of Grace?
> 2) STRICT LIABILITY: Is Grace strictly liable to MDU for a defective product?
> 3) BREACH OF IMPLIED WARRANTY: Was there a breach of implied warranty by Grace as to its products which proximately caused injury to plaintiff?
> 4) NUISANCE: Is Grace liable to plaintiff for nuisance?

The jury answered "No" to each question. [L-2-3].

The jury was also asked to answer a detailed Special Question to determine whether MDU's suit was time-barred under the North Dakota statute of limitations. That interrogatory asked the jury whether it found:

> from a preponderance of the evidence that prior to June 6, 1984, the plaintiff knew, or by the exercise of reasonable care should have known, the following:
> 1) That the Monokote fireproofing installed in certain areas of MDU's General Office Building contained asbestos;
> 2) That the asbestos-containing Monokote in MDU's General Office Building might pose a hazard; and
> 3) That the defendants were possibly liable.

The jury answered "Yes" to that three-element Special Question. [L-4].

The trial judge entered judgment for Grace based on the jury's explicit verdict on all liability counts and the statute of limitations. [L-1]. MDU did not move for a judgment n.o.v. or a new trial under Rules 50 & 59, Fed. R. Civ. Proc., and never argued that the jury verdict was unsupported by the evidence. MDU raised issues on appeal directed to the district court's instructions, rulings during trial and exclusion of specific offered exhibits.

III. *THE COURT OF APPEALS' OPINION*

Adopting MDU's allegations and reaching factual conclusions inconsistent with the jury's verdict, a panel of the Eighth Circuit reversed the entire judgment and remanded for a new trial. The opening sentence of its opinion states that

MDU sued Grace "two years after MDU learned that the Grace-manufactured fireproofing ... was releasing harmful asbestos fibers." [A-1]. It goes on to state that: "MDU first learned that the asbestos in the Monokote was releasing fibers and contaminating its building in early 1988." [A-3]. These critical issues of MDU's knowledge and its allegations of contamination were highly disputed at trial and the jury heard substantial contrary evidence.[3] The jury found that MDU was not injured by any negligence of Grace. [L-2]. The jury rejected MDU's claim that any alleged asbestos fiber release or property contamination rendered Monokote defective and unreasonably dangerous. [L-2, 9]. The jury further found that no warranty was breached and that Monokote did not present a nuisance [L-3], a claim that the Eighth Circuit did not mention as having been alleged by MDU and tried by the jury. [*See* A-3]. The court's conclusions that MDU "first knew" in 1988 of "contamination" and "harmful" asbestos fibers released from the Monokote fireproofing in this building are contrary to the jury's findings of no liability on any of MDU's claims, and its findings that MDU knew or should have known before 1984 that its building's fireproofing contained asbestos, that Monokote might pose a hazard and that Grace was possibly liable.

The Eighth Circuit's decision embraced other MDU allegations inconsistent with the jury verdict. The court stated that: "Subsequent tests confirmed this [contamination] and

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[3] For instance, the results of air tests taken in the building showed that asbestos exposure levels never exceeded any EPA, OSHA, or governmental regulation or standard. MDU's president admitted on cross-examination that there was no contamination and no health risk as of 1990, two years after the opinion states that MDU "first learned" the fireproofing was "contaminating" the building, [Tr. 3728-32].

found an average of more than 78 billion asbestos fibers per square foot on horizontal surfaces below the fireproofing." [A-3]. This statement, lifted verbatim from MDU's appellate brief, is contrary to the substantial rebuttal evidence[4] and the jury's special verdict findings of no liability. It was a central disputed issue throughout the entire trial. The court also undertook to interpret the scientific and health consequences of this statement:

> This number of fibers created asbestos levels in the air from 490 to 110,000 times normal, meaning that the asbestos needed to be removed immediately to protect the health of MDU workers.

Id. The concentration level which the court ascribed to the air in MDU's building has no scientific basis.[5] There is no federal regulatory requirement which gives any "meaning" to the supposed counts in surface dust and MDU never argued that the fireproofing had to be "removed immediately to

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[4] The "subsequent tests" were dust samples performed by MDU's litigation experts who reached inconsistent inferences and whose methods were thoroughly impeached at trial. United States Environmental Protection Agency ("EPA") guidance documents instruct that surface dust sample tests do not accurately demonstrate potential exposure hazards. [Tr. 3042-45].

[5] 110,000 times the EPA "clearance level" of 0.01 asbestos fibers per cubic centimeter would be 1100 fibers/cc of air. This level of fibers in the air would be eleven times more dense than what MDU's medical expert testified at trial would be an opaque cloud. [Tr. at 1468]. The results from MDU's own air monitoring tests taken in its building showed that no one who ever worked in or visited MDU's building was exposed to levels of asbestos which exceeded any government standard.

protect the health of MDU workers." The facts were uncontroverted that, with one small exception, MDU had not removed the fireproofing from its building. [L-7]. The jury considered all of the evidence and reached contrary conclusions of fact, all favorable to Grace, that MDU was not injured by any negligence of Grace, the fireproofing was not defective, there was no breach of any implied warranty, and the fireproofing does not create a nuisance.

Having announced factual assumptions of extreme contamination and immediate health hazard contrary to the jury verdict, the Eighth Circuit's entire legal analysis rests on false and improper premises. The opinion holds that the district court incorrectly instructed the jury on the statute of limitations defense on the sole ground that plaintiff's discovery of the "presence of asbestos" is insufficient to commence the running of the statute and, instead, that plaintiff's actual or constructive knowledge of contamination or harm must be shown. [A-12]. The district court had held on summary judgment that "presence of asbestos" was not enough and required additional proof at trial. *See supra* at 5 & 7-8. Although the Eighth Circuit perfunctorily recognized that federal law requires instructions be reviewed on appeal "as a whole" [A-7], it did not consider the second and third elements of the special interrogatory or the Special Question to determine if as a whole the jury's verdict was sustainable. Specifically, the court failed to give any deference to the jury's additional findings that, beyond presence of asbestos in its fireproofing, MDU also knew or reasonably should have known more than six years before it brought suit: that Monokote posed a hazard, and that Grace was possibly liable. Thus, the Eighth Circuit did not review the jury's verdict on the statute of limitations defense "as a whole."

The Eighth Circuit also held that the exclusion of two, one-page documents, among the hundreds of exhibits admitted, constituted reversible error. [A-13-19].[6] The documents related to MDU's allegations that Grace was aware of potential asbestos substitutes and knew of risks allegedly posed by exposure to in-place asbestos-containing materials in non-industrial settings. The Eighth Circuit did not consider the evidence as a whole and failed to acknowledge that the excluded documents could not likely alter the jury's findings that MDU was not injured by any negligence of Grace, that Monokote was not contaminating the building so as to make the fireproofing defective, and that Monokote did not constitute a nuisance.

REASONS FOR GRANTING THE WRIT

The Court has traditionally held that: "[t]he criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven fact has been respected." *Wilkerson v. McCarthy*, 336 U.S. 53, 70-71 (1949) (Douglas, J. concurring). This case warrants the Court's review because it raises important issues about the constitutional proscription on federal appellate courts reexamining facts tried by a jury and the standards for reviewing jury trials for evidentiary or instructional error. As the only court with authority to review and remedy constitutional violations by federal courts of

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[6] The two documents were a 1943 trademark for the name of a wood pulp product called "Cellufloc" registered to another company; and an insurance company's undated abstract, located in a Grace file folder, of an article entitled "Asbestosis" that did not refer to fireproofing generally or Grace's fireproofing specifically.

appeals,[7] the Court should insure the integrity of every litigant's right to have facts tried by a jury, the right of a jury to have its constitutional prerogative accorded full faith and credit, and the need for judicial restraint when reviewing judgments entered on special jury verdicts, especially those following lengthy and complex trials.

I. *THE COURT SHOULD GRANT CERTIORARI TO AFFIRM AND ENFORCE THE CONSTITUTIONAL PROHIBITION AGAINST APPELLATE COURTS MAKING FINDINGS OF FACT INCONSISTENT WITH THE JURY'S SPECIAL VERDICT.*

The Seventh Amendment to the United States Constitution embodies the value placed on resolutions of disputes by juries in the American democratic system of checks, balances and citizen participation:

> [T]he right of a trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. Amend. VII. This Court long ago stated that the Seventh Amendment was primarily adopted out of "the apprehension and alarm in respect to the appellate jurisdiction of this court over cases tried by a jury," *Justices, Etc. v. United States Ex. Rel. Murray*, 76 U.S. 658, 661 (1870) and

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[7] If the trial court had improperly disregarded the jury and entered j.n.o.v. or ordered a new trial, a court of appeals could correct the injustice but, if the Court of Appeals does so, only the Supreme Court has authority to protect and enforce the aggrieved party's rights.

that the reexamination clause is the "more important" clause of this amendment. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 443, 446 (1824). By assuring that a microcosm of the community has a constitutionally protected right to participate in the application of the law, the right to trial by jury serves as a buffer against tyranny. In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979), Justice Rehnquist, in dissent, noted that the Seventh Amendment was adopted because the right to have facts determined by a jury in civil cases was considered by the framers "a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary."[8]

Because the "federal courts operate under the strictures of the Seventh Amendment," even this Court is reluctant to "take steps which ultimately might interfere with the proper role of the jury." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 280 n.26 (1989); *see also Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 53 n.5 (1954) ("Appellate review in the federal courts is, of course, limited ultimately by the Seventh Amendment."). In *Atlantic & Gulf Stevedores v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962), the Court enforced the prohibition against *de novo* determination of factual issues by appellate courts as

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[8] The jury's role is critical because it preserves the democratic element of the law. When judges disregard jury verdicts, they insidiously undermine the integrity of the foundations of our system of justice: "the injury is not limited to the defendant, there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts." *Ballard v. United States*, 329 U.S. 187, 195 (1946). The jury is "a valuable process for decision making and an effective means for the fair resolution of disputed fact." Brookings Inst., *Charting a Future for the Civil Jury System* 8 (1992).

guaranteed by the reexamination clause. The Court held that an appellate court was not justified in reversing a judgment entered on a special jury verdict on the ground that the evidence supported a finding that the defendant was negligent when the jury had found otherwise:

> We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them.

Id. at 359-60. In *Tennant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35 (1943), the Court held that an appellate court improperly substituted its own view of the evidence for the jury by finding insufficient proof to support the jury's conclusion regarding proximate cause. The Court in *Tennant* defined the standard of appellate review of disputed matters of fact as follows:

> [The jury's] conclusion, whether it relates to negligence, causation, or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Id. at 35; *see also Hepburn v. Dubois*, 37 U.S. 743, 745 (1838) ("the finding of the jury on the whole evidence in a cause must be taken as negativing all facts which the party against whom their verdict is given has attempted to infer or establish by evidence"). Even if contrary inferences "might reasonably be drawn," the "Court of Appeals [is] bound to view the evidence in the light most favorable to [the

prevailing party] and give it the benefit of all inferences which the evidence fairly supports." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962).

In his article, *Judges Against Juries -- Appellate Review of Federal Jury Verdicts*," 1989 Wisc. L. Rev. 237 (1989), Eric Schnapper observes that not since the early 1960's has the Court granted review in a Seventh Amendment case to restrain appellate court judges from conducting fact-intensive review. He notes that a large number of appellate courts in recent years have all but ignored the constitutional limitations on their review authority - leading to an unchecked wholesale invasion of the province of the jury by appellate judges "who simply cannot resist acting like superjurors." *Id.* at 354. He concludes:

> In the absence of Supreme Court scrutiny or intervention, the circuit courts have been free to work their will on civil jury verdicts. This protracted suspension of enforcement of the seventh amendment has tested the extent of the inherent self-restraint on the part of judges given the raw power to overrule any jury verdict with which they happened to disagree. The experiment, and the result, bear a decided resemblance to William Golding's *Lord of Flies*.

Id. at 353-54, *cited in Nelson v. Production Credit Ass'n of the Midlands*, 930 F.2d 599, 607-08, n.9 (8th Cir.), *rehearing en banc denied, cert. denied*, 112 S.Ct. 417 (1991) (Heaney, J., now retired, dissenting) (noting "an unfortunate trend that is eroding the protection of the seventh amendment. Appellate reversals of jury fact-finding, once relatively rare, are now occurring more frequently.").

Even where Seventh Amendment guarantees of respect for jury findings are not at issue, this Court has imposed strict limits on appellate review of a district court's findings of fact under Federal Rule 52(a). In that context, the Court's holdings have been clear and unequivocal, admonishing the federal appellate courts not to construe facts to favor the losing party, but to review the record in the light most favorable to sustaining the judgment.[9] When appellate courts engage in *de novo* fact-finding, the consequences fail to serve either the public or the courts:

> To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.

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[9] *See, e.g., Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 857-58 (1982) ("An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently found innocent."); *Anderson v. City of Bessemer*, 470 U.S. 564, 573-76 (1985) (even when the district court's findings do not rest on credibility determinations, an appellate court oversteps the bounds of its duty under Rule 52(a) because "the trial on the merits should be the main event rather than a tryout on the road"); *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123 (1969) ("In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo."); *Maine v. Taylor*, 477 U.S. 131, 145 n.17 (1986) (appellate courts are not "free to examine carefully the factual record and draw [their] own conclusions").

Cmt. to Rule 52(a), Fed. R. Civ. Proc. (1985 amendment). *See also* C. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 779-80 (1957) ("The principal consequences of broadening appellate review are two. Such a course impairs the confidence of litigants and the public in the decisions of the trial courts, and it multiplies the number of appeals."). Plainly, these concerns should be multiplied many-fold where jury verdicts are the basis for the judgment under appeal. *See* G. Christie, *Judicial Review of Findings of Fact*, 87 Northwestern L. Rev. 14, 15 & 56 (Fall 1992) (the Seventh Amendment "continues to be part of our heritage [and] even in civil cases, the findings of juries should not be lightly ignored... There would be no point in having a trial if the conclusions arrived at can be overturned merely because a subsequent reviewer disagrees with them.").

As the commentators point out, the increasing involvement of the appellate courts in the fact-finding process and in substituting their own view of the evidence for that of the jury has far-reaching consequences for the right to trial by jury and judicial economy. The guidance of this Court is required to avoid arbitrary appellate discretion in reviewing civil jury verdicts. "The evisceration of the right to jury trial which has become commonplace in the circuit courts is now entirely perceptible: the need for Supreme Court action to restore the vitality of the seventh amendment is equally clear." Schnapper, *supra* at 355.

The Eighth Circuit's decision in the instant case illustrates the dangers of appellate court fact-finding and disregard for jury verdicts. From the outset, the analytical development of the opinion and the conclusions derived by the Eighth Circuit are premised on presumptions of fact which find no support in the verdict, any government regulation, or

even physical reality.[10] Unlike the jury and the trial court judge, which heard eight weeks of live testimony and argument from scores of admitted documents, the Eighth Circuit had no familiarity with the full presentation of the facts. Nevertheless, the appellate court, under *de novo* review of legal issues, announced radical and inflammatory factual conclusions of building contamination and extreme hazards posed by the fireproofing in this case as proven fact. In doing so, the appellate court adopted as true the assertions of the losing appellant as if the appeal was from a summary judgment under Federal Rule 56 (evidence to be construed to favor the non-moving party), instead of an appeal of a jury verdict with judgment entered by the trial court consistent with that verdict. [11]

By not giving any deference to the factual conclusions reached by the jury, the Eighth Circuit exceeded the limits of appellate authority and infringed upon Grace's constitutional right to have those issues decided by the jury without

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[10] As Judge Breyer has recently concluded, leaving asbestos-containing material in buildings poses no appreciable risk: "Most experts believe that white [i.e. chrysotile] asbestos left in place is virtually harmless ... The risk is so small as to be virtually meaningless." S. Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation*, at 12-13 (Harvard University Press 1993).

[11] In the process of reviewing appellants' arguments of erroneous trial rulings *de novo*, the appellate court should not proceed *tabula rasa*, ignore the verdict or assume it has jurisdiction to reach its own factual conclusions. Only the specifically argued legal issues are subject to *de novo* review, not the entire trial. Otherwise allegations of instructional or evidentiary error supercede the Seventh Amendment.

reexamination.[12] Had the appellate court followed the constraints imposed by the Seventh Amendment, no assumption of "contamination" or immediate hazard to the public could have been reached and the entire opinion would have been changed. The lack of contamination and the fact of no hazard to the public was a central focus of the trial and the verdict.[13] In sum, this Court should accept review to reemphasize the constitutional proscriptions on appellate court fact-finding in derogation of jury verdicts and to set forth guidelines for appellate court review of judgments entered on jury verdicts consistent with the Seventh Amendment.

II. *CERTIORARI IS WARRANTED TO CLARIFY THE STANDARDS FOR APPELLATE REVIEW OF ALLEGED INSTRUCTIONAL AND EVIDENTIARY ERRORS.*

Jury trials are fundamental to the American system of justice. However, they are not pristine exercises in judicial analysis. They involve an unfolding process of argument, presentation, and decision-making which will inevitably involve allegations of error by the losing party. A standard of perfection would virtually guarantee that no jury trial of any length or complexity would survive appeal.

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[12] It is significant that appellate court opinions and their conclusions of fact serve as guidance to courts throughout the country at every level. Especially in an area of nation-wide litigation such as asbestos-in-buildings claims, this broad power to affect defendants' rights must be exercised with caution.

[13] The instant opinion is the civil equivalent of an appellate court reviewing a jury verdict of innocent in a criminal case while assuming the crime was committed by the accused despite substantial evidence, argument and a verdict to the contrary.

Similarly, considering alleged errors in isolation artificially magnifies their significance and ignores the central issue of the trial's overall fairness. On appeal, losing parties always spotlight isolated "bad calls" as critical. They never appeal errors in their favor. At the same time, winning parties do not appeal - even if the majority of rulings were erroneous and prejudicial to their case. Accordingly, appellate courts cannot consider the propriety of a jury trial by addressing isolated allegations of error without placing them in the context of the heat of battle and the record as a whole.

Toward the end of preserving the integrity of the jury trial process as guaranteed by the Seventh Amendment, Rule 61 of the Federal Rules of Civil Procedure provides that:

> No error in either the admission or the exclusion of evidence or defect in any ruling or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 61, Fed. R. Civ. Proc.; *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553 (1984) (appellate courts must abide by the harmless error rule). Congress has further reinforced the application of Rule 61 by enacting the harmless error statute, which directly applies to the appellate courts:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

28 U.S.C. § 2111. In interpreting the harmless error rule and the statute, this Court has stated:

> We have come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered "citadels of technicality". The harmless error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for "error" and ignore errors that do not affect the essential fairness of the trial.

McDonough, supra, at 553 (emphasis added). Thus, federal courts of appeals in considering alleged instructional or evidentiary errors must (a) give judgment (b) after examining the full record (c) regardless of any errors (d) unless the appellant has demonstrated that the alleged errors prejudiced substantial rights and rendered the trial essentially unfair. Allowing appellate courts to ignore these principles "is contrary to the practical necessities of judicial management reflected in Rule 61 and § 2111", *id.* at 556, and erodes the jury system and its critical role in America's constitutional democracy. Had the Eighth Circuit followed the above analytical paradigm, it would have affirmed judgment on the jury verdict for Grace on both the statute of limitations defense and the liability counts and would have reinforced the Seventh Amendment.

A. *THE REVERSAL OF THE JURY'S VERDICT ON THE STATUTE OF LIMITATIONS VIOLATES THE SEVENTH AMENDMENT AND § 2111.*

Harmless error analysis applies to allegedly erroneous jury instructions. *See, generally,* C. Wright & A. Miller, *Fed. Prac. & Proc.* § 2886 (1973). On numerous occasions, this Court has held "well-established" the principle "that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973); *Western Air Lines Inc. v. Criswell*, 472 U.S. 400, 420 (1985) (same). *See also Tribble v. Westinghouse Elec. Co.*, 669 F.2d 1193, 1197 (8th Cir.), *cert. denied* 460 U.S. 1080 (1983) (same).

In this case, the Eighth Circuit perfunctorily acknowledged that federal appellate courts are to review jury instructions "as a whole" to determine if they "adequately and sufficiently state the law applicable to the case." [A-6]. Yet, it held that the district court's statute of limitations instruction was inadequate solely because the "discovery of asbestos" is insufficient to begin the running of the statute of limitations. [A-11: "the district court erred when it instructed that the issue for purposes of the statute of limitations was when MDU learned of the presence of asbestos in its building ..."].[14]

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[14] The Eighth Circuit also failed to recognize that this particular jury instruction had to be fashioned by the district court without a state or federal Jury Instruction Guide to fit the issues in this case. While the Eighth Circuit relied principally on *Tioga Public School District #15 v. U.S. Gypsum*, 984 F.2d 915 (8th Cir. 1993) for guidance (A-8-12), that decision was issued several months after this jury verdict was entered, did not involve application of any statute of limitations, and was instead focused

Although the Eighth Circuit acknowledged that mere discovery of the presence of an asbestos-containing product in a building did not trigger the running of a statute of limitations on the claims brought by MDU, it treated the mere "discovery" as if it were the only charge given to the jury. The appellate court conspicuously ignored the other two interrelated elements of the statute of limitations instructions and failed to view the special verdict in its entirety. In fact, the district court ruled on summary judgment that the mere presence of asbestos was insufficient, *see supra* at 5 & 7-8, and at trial required the jury to find two additional elements. The jury not only found that MDU knew or should have known by 1984 (1) that the Monokote in its building contained asbestos (presence) but also (2) that it might pose a hazard, and (3) that Grace was possibly liable. In other words, the appellate court reversed the statute of limitations verdict because it found the instruction was incomplete without considering the complete instruction.[15] This facile dismissal of an explicit three-prong jury verdict reflects a fundamental lack of concern for the jury's pronouncement and the integrity of a lengthy and complex trial which preceded it.

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on the application of the economic loss doctrine - an entirely different defense.

[15] *See Cool v. United States*, 409 U.S. 100, 106 (1972) (Rehnquist, J., dissenting) ("The trial court's instructions are to be taken as a whole, and even if an isolated passage might be error if standing by itself, that alone is not a sufficient ground for reversal."); *Torres-Valencia v. United States*, 464 U.S. 44 (1983) (Rehnquist, J., dissenting) ("I had thought that the days of parsing a trial record to find isolated instructional errors in a charge to the jury were long gone.").

The court also failed to consider whether the alleged deficiency in the instructions was cured in closing argument. In its analysis, the court stated that the proper inquiry should have been "when MDU could have learned, with the exercise of reasonable diligence, that its building had been contaminated by asbestos." [A-11-12]. During final argument, MDU specifically equated "hazard" with "contamination" and argued that the hazard required to commence the statute of limitations was when it knew or should have known that the building was contaminated. [Tr. 4300-301: "we had to wait until we've been damaged, until we can prove that there was a possible hazard from the material by showing contamination"]. As stated by this Court in reviewing a similar issue:

> Since the instructions in this case would not have prevented [MDU] from raising this contention to the jury in closing argument, we are satisfied that the verdict is a consequence of a defect in the [MDU's] proof rather than a defect in the trial court's instruction.

Western Airlines, supra at 420; *see also Cupp, supra* (recognizing that the jury instructions are "but one of several components of the trial"); *Stark v. Celotex*, 795 P.2d 1165, 1167 (Wash. App. 1990) (statute of limitation jury instruction in asbestos case is adequate if broad enough to permit the plaintiff to argue its theory of accrual). The instruction allowed MDU broad latitude to attempt to persuade the jury on this issue. The jury was not persuaded. The appellate court should not nullify a jury trial and send it back for a retrial of issues the jury has already heard and determined.

The Eighth Circuit further erroneously viewed as an impermissible inconsistency Grace's arguments that: (1) MDU

knew or should have known of its potential cause of action six years before filing [statute of limitations defense], and (2) MDU failed to show that it suffered any injury [liability defense]-- both found by the jury. [A-12, n.9]. In *Gallick v. Baltimore & O.R.R. Co.*, 372 U.S. 108, 119 (1963), this Court held that, when confronted by seemingly inconsistent answers to the special verdict interrogatories, a federal appellate court has a duty under the Seventh Amendment to attempt to harmonize those answers if possible under a fair reading of them. *See also Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., supra*, 369 U.S. 355, 364 (1962) ("Where there is a view of the case that makes the answers to special interrogatories consistent, they must be resolved that way. For a search of one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment."). Here, the arguments, and the jury's findings for Grace on all liability issues as well as the statute of limitations, are completely consistent. The district court recognized that MDU's allegations of contamination and hazard were in dispute. Consequently, it instructed the jury to find when MDU learned that Grace's asbestos-containing product was in its building; that Grace's product might pose a hazard; and that Grace might be liable to it. The instruction, in its entirety, allowed the jury to determine when MDU should have known of the harm that it alleged while, if it so found, still rejecting MDU's allegation as unproven.[16]

The Eighth Circuit's failure to harmonize the jury's separate special verdict findings and its enunciation of their

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[16]A cause of action subject to the North Dakota statute of limitations under § 28-01-16 accrues once a putative plaintiff "knows, or with reasonable diligence should know, that a potential claim exists." *BASF Corp. v. Symington*, 512 N.W.2d 692, 695 (N.D. 1994) (emphasis added).

incompatibility, as a matter of law, effectively requires a defendant to prove the truth of the plaintiff's alleged but non-existent injury in order for the defendant to try to a jury whether the plaintiff knew or should have known of its potential cause of action in light of plaintiff's allegations that it had been injured. The Eighth Circuit stated that the "proper question" for the statute of limitations should have been "when MDU could have learned, with the exercise of reasonable diligence, that its building had been contaminated." [A-11; emphasis added]. To require defendant to prove a plaintiff's actual injury would immunize a frivolous or unsupported complaint from this defense. Far from preserving the right to a jury trial, the Eighth Circuit's ruling on this issue effectively bars defendants from presenting a statute of limitations defense to a jury whenever the elements of the plaintiff's claims are contested and strips defendants of their Seventh Amendment right to a jury trial of this universally recognized defense.

B. *THE REVERSAL OF THE JURY'S VERDICT OF NO LIABILITY ON ALLEGED EVIDENTIARY ERROR VIOLATES THE SEVENTH AMENDMENT AND § 2111.*

Under 28 U.S.C. § 2111, the harmlessness of an error is to be judged after consideration of the record as a whole. *Yates v. Evatt*, 500 U.S. 391, 111 S.Ct. 1884, 1887 (1991). In *United States v. Lane*, 474 U.S. 438, 106 S.Ct. 725 (1986), the Court emphasized that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations: "[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and the Constitution does not guarantee such a

trial." 106 S.Ct. at 730, *quoting United States v. Hasting*, 461 U.S. 499, 508-09 (1983).

The Eighth Circuit concluded that remand of the entire case was required based on the exclusion of two, one-page documents without any analysis of the verdict of the jury, the record as a whole, or the opportunity provided MDU to present substantial other evidence on the same issues. While making passing reference to the harmless error doctrine [A-14], the appellate court did not apply it. Notwithstanding the eight weeks of trial and admission of scores of documents in this case, the Eighth Circuit held: "As with exclusion of the Cellufloc trademark, we cannot say the exclusion of [the asbestosis abstract] was harmless." [A-17]. It never determined whether the alleged errors affected the substantial rights of the parties or rendered the entire eight week trial unfair.

Moreover, the Eighth Circuit in this opinion held that "the injury for which asbestos plaintiffs are being recompensed is the contamination of their buildings" and that absent a finding of contamination the claim would be barred. [A-10-11]. Yet, read in its entirety and in the context of the whole record, the jury in this case found that MDU was not injured through any negligence of Grace and that the Monokote was neither a nuisance nor did it contaminate MDU's building rendering the product defective. The two excluded documents go only to Grace's alleged knowledge before 1968 - not to any alleged hazard or harm suffered by MDU. Their admission would be highly unlikely to have affected the jury's rejection of MDU's claims of injury, contamination and nuisance arising out of Monokote. The jury verdict already determined the facts which the Eighth Circuit concluded were dispositive of MDU's claims, yet it did not apply the jury's findings to the law as enunciated in

its opinion. Rather, the court remanded for a new trial. Considering the record as a whole and the verdict of the jury, the two excluded documents were harmless.

This Court should grant certiorari to clarify the harmless error standards to be applied by appellate courts in reviewing judgments entered on jury verdicts. The Eighth Circuit's standard for remand, i.e., that it "cannot say" that the evidentiary exclusions were "harmless," renders trials virtually meaningless and effectively nullifies 28 U.S.C. § 2111.[17] The standard on appellate review should not be what the court "cannot say," but whether the court "can say" that the alleged error rendered the trial essentially unfair so as to require the parties, the district court, and a new panel of jurors to go through an entirely new trial.

CONCLUSION

American jurisprudence recognizes the central importance of the right to trial by jury - not by appellate courts. That right should be preserved by the guidelines which appellate courts must follow in reviewing jury trial judgments. The guidelines must recognize that the jury and trial court judge observe the testimony and hear the arguments in their entirety. Their judgment must be given deference and must not be superseded by an appellate court's adoption of its own or the losing party's contrary view of the evidence. Nor should the hard-fought results of a jury trial be nullified based on anything less than a clear showing of fundamental

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[17] Petitioner can find no other federal appellate court enunciating such a relaxed standard of review for harmless error as the Eighth Circuit espoused and applied in reviewing the trial court's two evidentiary exclusions during this eight week trial.

unfairness of the overall trial after an examination of the record as a whole. To do otherwise, for appellate courts to disregard jury verdicts, impose their own views of the ultimate facts on the case and overturn jury trials based on isolated allegations of error without a finding of substantial prejudice, would thoroughly undermine the trial process, its democratic underpinnings, and its constitutional guarantees. Grace respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

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MDU RESOURCES GROUP, doing business as Montana--Dakota Utilities Co., Inc., Appellant,

v.

W.R. GRACE AND COMPANY, and W.R. Grace and Company--Conn., Appellees.

No. 92-2794.

United States Court of Appeals, Eighth Circuit.

Submitted Oct. 11, 1993.

Decided Jan. 27, 1994.

Rehearing and Suggestion for Rehearing En Banc Denied March 24, 1994*

Before RICHARD S. ARNOLD, Chief Judge, WOLLMAN and LOKEN, Circuit Judges.

RICHARD S. ARNOLD, Chief Judge.

The appellant in this asbestos-removal case, MDU Resources Group, d/b/a Montana Dakota Utilities Co. (MDU), sued W.R. Grace & Co. (Grace) in 1990, two years after MDU learned that the Grace-manufactured fireproofing installed in its building in September of 1968 was releasing harmful asbestos fibers. After an eight-week trial, the jury returned a special verdict in favor of Grace on all of MDU's theories of liability. MDU now argues that several errors

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*Bowman and Beam, Circuit Judges would grant the suggestion for rehearing en banc.

occurred at trial. First, MDU argues that the District Court used the wrong measuring point to determine when the statute of limitations began to run and, in so doing, misapplied North Dakota's discovery rule. Second, MDU argues that the District Court improperly excluded pieces of evidence MDU needed to establish key elements of its case-in-chief. Third, MDU argues that the District Court incorrectly instructed the jury on strict liability because it failed to instruct that state-of-the-art is no defense to a strict-liability claim. Finally, MDU argues that the District Court's permissive conduct towards Grace during the trial resulted in a proceeding that was fundamentally unfair. We agree with some of these contentions and now reverse.

I.

Since the trial of this case was lengthy and complicated, we will present only the facts and portions of the trial relevant to the issues presented in this appeal. In 1967 and 1968, MDU completed construction of its five-story general office building in Bismarck, North Dakota. In 1968, Monokote fireproofing, manufactured by Grace, was sprayed on the structural steel and decking of the building. The application was completed by September of that year. At the time of installation, Grace was aware that the Monokote fireproofing contained asbestos. MDU, however, was not aware of this fact until September of 1980, when Health Department tests revealed that the Monokote contained 15-25% asbestos. The Health Department report also stated that the asbestos was "apparently intact" and that there were "no employee overexposure hazards." Nonetheless, the Department recommended that MDU investigate carefully removing the material, because the Monokote eventually would begin to deteriorate and would then pose a health hazard. Although MDU received conflicting information from

a subsequent test in 1985, the original test's results were corroborated in 1987, and both parties agree that MDU was aware of its asbestos problem as early as 1980.

MDU first learned that the asbestos in the Monokote was releasing fibers and contaminating its building in early 1988. A report from HTI Engineering showed that the building had been contaminated. Subsequent tests confirmed this and found an average of more than 78 billion asbestos fibers per square foot on horizontal surfaces below the fireproofing. This number of fibers created asbestos levels in the air from 490 to 110,000 times normal, meaning that the asbestos needed to be removed immediately to protect the health of MDU workers. MDU brought this suit in 1990 to obtain the costs of removal.

MDU sued under a number of different theories: negligence, strict liability, failure to warn, and breach of warranty. Grace mounted a two-fold defense. It argued first, that the statute of limitations had run on MDU's claims, and second, that MDU had suffered no harm from the asbestos Monokote. At trial, MDU argued that Grace was aware of the inherent dangers of asbestos, that Grace knew that Monokote contained asbestos, and that, prior to 1968, Grace had a readily-available alternative, Cellufloc.[1]

Grace told the jury in its opening statement that it took the asbestos out of Monokote in 1973, but claimed that a non-asbestos substitute was not available before 1968. Transcript (Tr.) 57, 3425-28. In order to prove that an alternative substance was available, MDU offered into evidence, among

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[1] Cellufloc is a paper and wood-pulp product that Grace ultimately used to replace the asbestos in Monokote in 1973.

other things, a 1943 trademark for Cellufloc that tended to show that Cellufloc had been available before 1968. The District Court excluded this evidence because the trademark did not demonstrate the efficacy of the product. Tr. 2823.

MDU also sought to introduce a one-page document from Grace's insurance carrier to Grace's Safety Administrator entitled "Asbestosis." The document, plaintiff's exhibit P-83A, summarized a 1966 article published by the American Insurance Association on the relationship between asbestos exposure and cancer. P-83A discussed the health risks inherent in fitting, cutting, and removing asbestos materials in buildings. MDU offered the document at trial to show that Grace knew, before September 1968, that asbestos was harmful to human health. While recognizing that the summary was highly probative and relevant, the Court ultimately excluded P-83A on the grounds that an improper foundation had been laid. The Court concluded that MDU had not established that Grace received the document before September of 1968.[2]

In addition to the evidentiary issues, MDU also disputes the District Court's permissive treatment of Grace's cross-examination strategy. In pre-trial conference, MDU requested that the District Court confine Grace's cross-examination of MDU's witnesses to the scope of direct. The District Court gave MDU that assurance. At trial, however, the Court allowed Grace to ask MDU's witnesses leading

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[2] We do not address MDU's third evidentiary claim--that the District Court improperly admitted into evidence an article from "Science" magazine. Any error from this admission may have been corrected by the District Court's permitting MDU to introduce its own articles in response. In any event, the District Court will have an opportunity to reassess the article's admissibility on remand.

questions that were designed to establish Grace's statute-of-limitations defense. Although MDU objected to this practice, the Court continued to allow it. At one point, during MDU's case-in-chief, the Court prodded MDU to question its witness regarding Grace's statute-of-limitations defense. Tr. 2397. MDU also alleges that several other occurrences at trial tainted the proceedings with a fundamental unfairness.[3]

Finally, two of the Court's instructions to the jury are challenged. First, the District Court instructed the jury that in order to find in favor of Grace on its statute-of-limitations defense, it must find that MDU knew or with the exercise of reasonable care should have known

1. That the Monokote fireproofing installed in certain areas of MDU's General Office Building contained asbestos;

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[3] MDU alleges that the trial was fundamentally unfair because Grace was allowed to show a blow-up photograph of MDU's CEO while MDU was prevented from doing the same with Grace's CEO. Certainly, this type of demonstrative evidence is unnecessary on either side. Additionally, MDU argues that, during cross-examination, the District Court allowed Grace to present evidence as to MDU's size--to show MDU's knowledge of asbestos hazards--but prevented MDU from making reference to Grace's size. Grace's size is, of course, irrelevant to anything but punitive damages; by the same token, the relevancy of MDU's size to this case is dubious at best. Finally, MDU argues that the Court improperly allowed Grace to discuss MDU's gravel pit, acquired one month before trial, which Grace claimed was an asbestos mine. At one point, the Court itself referred to this pit as an "asbestos mine." Regardless of whether this pit did or did not contain asbestos, it is irrelevant to the question of what MDU and Grace knew or did not know in 1968 (when the Monokote was installed) and 1980 (when MDU discovered the presence of asbestos)--the relevant dates for liability and statute-of-limitations purposes.

2. That the asbestos-containing Monokote in MDU's General Office Building might pose a hazard; and

3. That the defendants were possibly liable.

Jury Instruction Number 27. The District Court further instructed that Grace had to prove these elements by a preponderance of the evidence.

Second, before the Court gave its strict-liability instruction, MDU requested that the Court include an instruction that it is no defense to strict liability that the product was state-of-the-art. Because the District Court had told the jury that such evidence was a valid defense to a negligence claim, MDU wanted the negative instruction included in the strict-liability instruction for clarity. Grace contended that MDU was not entitled to such an instruction. Although the District Court agreed that MDU's proposed language correctly stated North Dakota law, it declined to give the instruction. The jury returned a verdict in favor of Grace.

II.

A.

[1,2] This Court will not reverse on the basis of jury instructions if they, "as a whole, adequately and sufficiently state the law applicable to the case." *Sterkel v. Fruehauf Corp.*, 975 F.2d 528, 531 (8th Cir. 1992). We review the District Court's determinations of law *de novo*. Because the District Court's jury instructions on the statute of limitations failed to state the law adequately and sufficiently as to when discovery of asbestos triggers the running of the statute of

limitations, we are unable to affirm this judgment for the defendant Grace on the basis of its limitations defense.

[3,4] Under North Dakota law, the statute of limitations for a cause of action based on asbestos contamination is six years. N.D. Cent. Code § 28-01-16 (1991). To determine the point at which any statute of limitations begins to run, North Dakota applies the discovery rule. *Wall v. Lewis*, 366 N.W.2d 471, 473 (N.D. 1985) (legal malpractice); *Iverson v. Lancaster*, 158 N.W.2d 507 (N.D. 1968) (medical malpractice). Originally adopted for medical-malpractice claims, North Dakota applied this rule to asbestos cases in *Hebron Public School District No. 13 v. U.S. Gypsum Co.*, 475 N.W.2d 120, 126 (N.D. 1991) (certified question answered): "a cause of action, or claim for relief does not accrue until the aggrieved party discovers the facts which constitute the basis for its cause of action or claim for relief...."

Grace argues that *Hebron* stands for the proposition that discovery of the presence of asbestos equals discovery of the facts which constitute the basis for MDU's cause of action. Therefore, they argue, MDU knew of its cause of action in 1980 and filed its claim long after the statute of limitations had begun to run. MDU contends that, under North Dakota's economic-loss doctrine, it could not have brought suit until it could show its building had been "injured" by the asbestos; therefore, the "facts which constitute the basis for its cause of action" were not known until MDU discovered the asbestos contamination in 1988. The District Court instructed the jury based on Grace's theory of the statute of limitations.

[5,6] Regardless of the plaintiff's knowledge of a potential cause of action, no cause of action exists until the plaintiff

suffers some compensable harm. See *Wall v. Lewis, supra,* 366 N.W.2d at 473. *Hebron* does not stand for nearly so broad a principle as Grace suggests,[4] and a study of this Court's precedents in asbestos litigation and of North Dakota's economic-loss doctrine demonstrates that mere discovery of asbestos is insufficient to begin the running of the statute of limitations.

[7] Before we can determine when the statute of limitations began to run on MDU's claims, we must first determine when an asbestos plaintiff is injured and can bring suit. The issue of when injury occurs was implicitly decided in *Tioga Public School District # 15 v. U.S. Gypsum*, 984 F.2d 915 (8th Cir. 1993). Although not a statute-of-limitations case, *Tioga* does address the point at which an asbestos plaintiff may be said to be injured under North Dakota law. In *Tioga*, the plaintiff school district discovered that the acoustical covering on the ceiling tiles contained asbestos and sued to recover abatement costs. The defendant argued that the school district had

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[4] The issue in *Hebron* was whether the six-year period began to run when the asbestos was installed, 1963, or from when the asbestos was discovered to be present, 1983. Because the School District discovered that plaster in its building contained a dangerous level of asbestos and brought suit within three years of that discovery, it was well within the statute of limitations. Additionally, the tile in *Hebron* was friable and had begun to release harmful asbestos fibers into the air. *Hebron Public School District No. 13 v. U.S. Gypsum,* 690 F. Supp. 866, 870 (D.N.D. 1988). Therefore, the issue of whether the point of injury was discovery of the asbestos itself or the release of harmful fibers into the air was neither presented nor addressed either by this Court (see *Hebron Public School Dist. No. 13 v. U.S. Gypsum,* 953 F.2d 398 (8th Cir. 1992)) or by the North Dakota Supreme Court (see *Hebron, supra,* 475 N.W.2d 120).

suffered only economic loss and could not recover. The *Tioga* Court concluded that, although the North Dakota Supreme Court had adopted the economic-loss doctrine,[5] it would be unlikely for it to hold that the doctrine barred recovery in asbestos cases. This Court stated, "The asserted injury here is not simply an injury to the [covering] or to the school buildings; rather, the injury is the *contamination* of the Tioga school buildings by asbestos and the consequent health risk to the building's occupants." *Id.* at 918 (emphasis supplied). The Court then cited several other jurisdictions that had similarly so held. See *City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975 (4th Cir. 1987) (injury at issue was contamination of Greenville's city hall, which endangered the health of the occupants); *Detroit Bd. of Educ. v. Celotex Corp.*, 196 Mich. App. 694, 703-4, 493 N.W.2d 513, 518 (1992) (because asbestos may contaminate a building, rendering it unfit for occupation, economic-loss doctrine does not apply); *Board of Educ. v. A, C & S, Inc.*, 131 Ill.2d 428, 137 Ill.Dec. 635, 640-46, 546 N.E.2d 580, 585-91 (1989)

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[5] The premise behind the economic-loss doctrine is that tort law is the appropriate vehicle for recovery when a defective product causes personal injury or injury to property other than itself, but is not appropriate for use to reallocate the balance of the buyer/seller relationship. *Hagert v. Hatton Commodities, Inc.*, 350 N.W.2d 591, 594 (N.D. 1984) (adopting the economic-loss doctrine as the rule in North Dakota and citing with approval *Seely v. White Motor Co.*, 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965)). The allocation of purely economic loss, such as occurs when the product or a component part of the product destroys only the product itself, see *Cooperative Power Ass'n v. Westinghouse Electric Corp.*, 493 N.W.2d 661 (N.D. 1992), is better handled through contract and warranty than tort. Thus, the economic-loss doctrine prevents recovery for losses that are not attributable to physical injury to persons or other property.

(economic-loss doctrine does not bar recovery when the asbestos has contaminated the building, thereby damaging other property). All of these jurisdictions based their determinations, at least in part, on the fact that asbestos contamination presents a grave health risk. This leads to the conclusion that the injury for which asbestos plaintiffs are being recompensed is the contamination of their buildings and not the mere presence of asbestos.[6]

The *Tioga* Court drew support for its conclusion by distinguishing the only case to hold an asbestos claim barred by the economic-loss doctrine, *Adams-Arapahoe School District No. 28-J v. GAF Corp.*, 959 F.2d 868 (10th Cir. 1992). The *Tioga* Court stated that *Tioga* differed from *Adams-Arapahoe* in an important respect: "in *Adams-Arapahoe* the school district did not show that there had been any release of asbestos from the asbestos-containing materials (nonfriable tiles) in its schools so as to result in the contamination of the schools." *Tioga, supra,* 984 F.2d at 919 (citing *Adams-Arapahoe,* 959 F.2d at 874). Since the Tioga School District had shown that the asbestos in its schools was friable and had released asbestos fibers into the air, its claim

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[6] The District Court in *Hebron, supra,* and *Drayton Public School District No. 19 v. W.R. Grace,* 728 F. Supp. 1410 (D.N.D. 1989), rejected the defendant's economic-loss argument on the basis that the building had been contaminated. See *Hebron, supra,* 690 F. Supp. at 870 ("However, it appears that the coating functioned satisfactorily in its intended role except that, Hebron alleges, it released harmful asbestos fibers into the building"); *Drayton, supra,* 728 F. Supp. at 1412-13 (quoting *Hebron* and saying that the Drayton School District's claim that the dangerous levels of asbestos in the ceiling plaster made the building hazardous to health meant the economic-loss doctrine did not apply).

was not barred by the economic-loss doctrine. *Tioga, supra,* 984 F.2d at 919-20.

[8] MDU alleges that its building was contaminated by the Monokote fireproofing because the Monokote was releasing harmful asbestos fibers. Indeed, under the criteria set forth in *Tioga*, had MDU brought its cause of action before its building was contaminated, its claim would have been barred by the economic-loss doctrine. *Cf. Cooperative Power Association v. Westinghouse Electric Corp.*, 493 N.W.2d 661, 663 n. 5 (N.D. 1992) ("In the context of products liability cases, economic loss generally means pecuniary damage that occurs through loss of value or use of the goods sold or the cost of repair together with consequential lost profits *when there has been no claim of personal injury or damage to other property,*" (emphasis added)).[7] Therefore, the District Court erred when it instructed that the issue for purposes of the statute of limitations was when MDU learned of the presence of asbestos in its building; instead, the proper question was when MDU could have learned, with the exercise of reasonable diligence, that its building had been contaminated by asbestos.[8] See *Froysland v. Altenburg,* 439

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[7] In *Cooperative Power*, the plaintiff contended that if a product was unreasonably dangerous or defective, the economic-loss doctrine would not bar recovery for products that damage only themselves. Therefore, it is likely that the North Dakota Supreme Court would find that MDU had no cause of action until the asbestos Monokote injured something other than itself--in other words, until some amount of harm, either to the building or to the occupants, occurred.

[8] The harm necessary to begin running the statute of limitations would certainly be manifest upon discovery of contamination, and possibly earlier. If, for example, MDU

N.W.2d 797 (N.D. 1989) (requiring diligence on the part of the plaintiff to discover his cause of action); *Tioga, supra.* It is at this point that North Dakota's six-year statute of limitations began to run. We hold that the jury was incorrectly instructed on this point, and so reverse its finding that the statute of limitations had expired.[9]

B.

We now address the other errors raised by MDU. The two most important are evidentiary in nature. First, MDU asserts that the District Court erred when it excluded the 1943 Cellufloc trademark. After presenting evidence that replacing the asbestos with a non-asbestos substitute, Cellufloc, was technologically feasible in the early 1970's, MDU attempted to show, by offering the 1943 trademark for Cellufloc, that the substitute was available before 1968. The Court excluded the trademark because the trademark itself did not show that the substance would be an adequate substitute for asbestos. This Court reviews the trial court's determination under the abuse-of-discretion standard. We will find abuse of discretion

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expanded or remodeled its building between May of 1980 and six years before filing suit, such remodeling could trigger abatement costs and would begin running the statute of limitations. Since the record does not demonstrate whether MDU renovated its building during the time period in question, we merely note this issue for purposes of the new trial.

[9] Grace argued at trial not only that the statute of limitations had run, but also that the plaintiff had suffered no injury from the asbestos Monokote. The arguments are inconsistent: if MDU has suffered no injury from the Monokote, then it has no cause of action--until an injury is suffered, the statute of limitations cannot begin to run.

when the decision of the trial court is based on "an erroneous view of the law or a clearly erroneous assessment of the evidence." *Waible v. McDonald's Corp.*, 935 F.2d 924, 926 (8th Cir. 1991) (citations omitted).

We agree with the District Court that for Cellufloc to be a feasible replacement it must be both technically sufficient and economically viable. However, the Court's requirement that the trademark itself demonstrate its own effectiveness misses the point. Grace denied that a substitute even existed, regardless of feasibility. MDU offered the trademark to rebut this argument by showing availability. The trademark tended to show that a product with the same name as the one Grace ultimately used to replace asbestos existed in 1943, long before Monokote was installed in MDU's building. That the product bore the same name was not the only evidence offered by MDU. MDU also presented evidence to the effect that the 1943 Cellufloc, like the Cellufloc used by Grace, was a filler--in plastics and casings for steel arc- welding rods. Additionally, the Cellufloc ultimately used by Grace was a paper and wood-pulp product; the company receiving the trademark for Cellufloc was a timber and wood-pulp company. Taken together, this evidence is sufficient to establish the relevancy of the trademark, because the jury could infer that the two products were similar. This inference would not be unduly prejudicial to Grace. If the 1943 Cellufloc would not have been a feasible alternative to asbestos, if the earlier and later Celluflocs were completely different, or if Grace was unaware of the 1943 product's existence, Grace could introduce evidence to that effect.[10] In excluding this relevant evidence,

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[10] The trademark was assigned in 1963 to the Georgia-Pacific Corporation, which renewed the trademark in 1966 and 1986.

the District Court misapprehended the purpose for which the trademark was offered. Its decision to exclude the trademark was therefore an abuse of discretion.

[9] The Court's exclusion of this evidence was not harmless error. Without it, MDU was unable to refute Grace's assertion that Grace was unable to replace the asbestos before 1968. Tr. 3425-28. This becomes all the more important since Grace's own representative testified that reformulation and testing efforts aimed at producing Monokote without asbestos before 1968 would have been possible had a substitute been available. Tr. 2816-17. Furthermore, the 1943 trademark was not the only feasibility evidence excluded by the Trial Court. The Court also excluded documents provided by Grace to MDU that tended to show that Grace was aware of alternatives to asbestos before 1968. Tr. 2861-63, 2868-69. Had other evidence of alternative design been admitted, exclusion of the 1943 trademark might have been harmless. As it is, however, the exclusion was prejudicial and warrants reversal.[11]

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[11] Grace cites *Anderson v. Malloy*, 700 F.2d 1208 (8th Cir. 1983), for the proposition that the District Court here did not commit reversible error. However, *Anderson* stands for precisely the opposite conclusion. In *Anderson*, to controvert the hotel-owner defendant's contention that effective security measures were not feasible at the time the plaintiff was raped, the plaintiff's wanted to present evidence that the owners had later installed peepholes and chain locks. The District Court excluded this evidence under rule 407 as evidence of subsequent remedial measures. This Court reversed, saying that "the trial court committed a prejudicial abuse of discretion when it excluded the evidence" because evidence that these devices were later installed went directly to the question of whether installing such devices was feasible. *Id.* at 1213-14. Similarly, the Cellufloc trademark goes to feasibility, providing

The second evidentiary ruling MDU challenges is the trial Court's decision not to admit plaintiff's exhibit P-83A. A summary of a 1966 article entitled "Asbestosis," P-83A was the last of five stapled pages. The pages had been given to Grace by its insurance carrier, and all but the last were dated 1967. MDU offered P-83A to demonstrate that Grace was aware of the dangers of asbestos before September of 1968. The District Court initially admitted this exhibit subject to foundation. Later, the Court determined that the document would not be admitted because an improper foundation had been laid and because it had hearsay concerns with the first paragraph. MDU redacted the first paragraph and resubmitted the exhibit. The Court then rejected the exhibit because MDU had failed to establish the date of its receipt by Grace.

Rule 104 of the Federal Rules of Evidence provides that preliminary questions of admissibility are to be determined by the Court subject to the requirements of subsection (b): "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Fed. R. Evid. 104(b). Once evidence sufficient to support the finding is introduced, it is then appropriate to allow the jury to determine whether the predicate fact is established. "If preliminary questions of conditional relevancy were determined solely by the judge, ... the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed." Fed. R. Evid. 104(b) Advisory Committee's Note.

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evidence that substitute eventually used by Grace in 1973 was available to it before September of 1968.

When the District Court determined that MDU had failed to establish the date of receipt, it was, in effect, determining that a preliminary fact (when Grace received the document) had not been established. This was error. As a matter of law, MDU produced sufficient evidence to allow the jury to establish the date of receipt. First, when evidence is in the control of one party and not produced to the other, the factfinder may infer that the evidence would establish what the other party proposes. In other words, the documents in question, which came out of a file folder, Folder K, were in the sole custody and control of Grace when they were produced. Since Grace did not provide MDU with the evidence necessary for it to establish date of receipt, such as the nature of the filing system Grace used, the factfinder could infer that any such evidence would establish that the document was received before September of 1968.

Second, the fact that the "Asbestosis" article was the fifth page of five pages stapled together raises an inference that the pages were received at the same time. It is too much to ask of the plaintiff to present specific proof that the last sheet was received before September of 1968. Finally, of a total of 197 pages in File Folder K, all those that were dated have dates of 1968 or earlier. Each document in the folder located before P-83A is dated before September of 1968; moreover, 100 pages of the documents after P-83A are dated September of 1968 or before. Only four documents in the folder bear a date after September of 1968; all of them were located after P-83A in the folder, and three of them refer to work done in late 1968.

These facts are sufficient, as a matter of law, to support a finding that Grace received P-83A before September of 1968. Once the plaintiff established these facts, the District Court should have made a preliminary determination

that facts sufficient to prove the relevancy of the document had been established. It should have then submitted the document to the jury with an instruction that, if it found that Grace received the document before September of 1968, the jury could consider it as evidence that Grace was aware of the hazards of asbestos before Monokote was installed in MDU's building. If the jury did not find that the document was received before September of 1968, then the document would be irrelevant to the question of liability. Grace can still argue that the document was not received before September of 1968, but any such argument would be for the jury to consider in determining whether P-83A's relevancy was established and would not alter the fact that MDU met Rule 104's requirements for admissibility.[12]

As with exclusion of the Cellufloc trademark, we cannot say the exclusion of P-83A was harmless. The District Court commented that the document was "a pretty critical piece of paper" if received by Grace before September of 1968 and stated that P-83A "establishes a level of knowledge of the existence of a problem" that "throw[s] a cloud on the position of W.R. Grace." Tr. 2422, 2440. The Court also remarked that the document had "some more relevance than substantially other instruments...." Tr. 2445. These

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[12] Stating that an improper foundation was laid is often another way of saying that the document was not properly authenticated. However the issue is phrased, the analysis is the same. Rule 901(a) provides that the authentication requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." To satisfy this requirement, MDU needed only to demonstrate a rational basis for its claim that the evidence is what MDU says it is. *United States v. Long*, 857 F.2d 436, 442 (8th Cir. 1988), *cert. denied*, -- U.S. --, 112 S.Ct. 98, 116 L.Ed.2d 69 (1991).

comments show that P-83A was critical to MDU's case because it would have enabled MDU to establish the knowledge necessary to hold Grace liable on a failure-to-warn theory. Under the circumstances, excluding P-83A was prejudicial error.

[10,11] Many of the other errors alleged by MDU are mooted by this remand; however, a few comments by way of guidance would be helpful to the retrial of this case. First, although the scope of cross-examination is within the discretion of the trial court, Fed. R. Evid. 611,[13] it should not be allowed to get out of hand. When cross-examination goes beyond the scope of direct, as it did here, and is designed, as here, to establish an affirmative defense (that the statute of limitations had run), the examiner must be required to ask questions of non-hostile witnesses as if on direct. Fed. R. Evid. 611(c), Advisory Committee's Note.[14] In other words, Grace should not be permitted to ask leading questions in its attempt to establish its statute-of-limitations defense through cross-examination of witnesses called by MDU in its case-in-chief, unless those witnesses' direct testimony bears significantly on the limitations issue, or unless Grace can sufficiently demonstrate that those witnesses are hostile. Second, we do not find reversible error in the Court's strict-

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[13] Rule 611(b) provides: "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."

[14] The Comment to subdivision (c) states: "The purpose of the qualification 'ordinarily' is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact...."

liability instruction, and we agree that MDU is not necessarily entitled to an express instruction that state-of-the-art is no defense to strict liability. However, since this cause is to be remanded, we recommend that the District Court use the strict-liability instructions in *Spieker v. Westgo, Inc.*, 479 N.W.2d 837 (N.D. 1992), as a model. Because the North Dakota Supreme Court held that these instructions were sufficient without a negative state-of-the-art instruction, using them as a model will insure that the jury instructions, as a whole, adequately state North Dakota law.

III.

The District Court misapplied North Dakota's discovery rule when it failed to instruct the jury that there must be some harm, such as contamination, beyond the mere discovery of the presence of asbestos, for the statute of limitations to begin to run. The District Court also erred in excluding key pieces of evidence offered by MDU: the 1943 Cellufloc trademark and the summary of the "Asbestosis" article, exhibit P-83A. Therefore, we reverse and remand for a new trial in accordance with this opinion.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-2794NDBI

MDU Resources Group, doing business as Montana-Dakota Utilities Co., Inc.,	*	
	*	Order Denying
Appellant,	*	Petition for Rehearing and
vs.	*	Suggestion for Rehearing En
W.R. Grace and Company, and W.R. Grace and Company-Conn.,	*	Banc
Appellees.	*	

The suggestion for rehearing en banc is denied. Judge Bowman and Judge Beam would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

March 24, 1994

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Received Apr. 5, 1994
Edward J. Klecker, Clerk
U.S. District Court-North Dakota

Filed Apr. 7, 1994
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U.S. District Court-North Dakota

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 92-2794NDBI

MDU Resources Group, doing business as Montana-Dakota Utilities Co., Inc.,

Appellant,

vs.

W.R. Grace and Company, and W.R. Grace and Company-Conn.,

Appellees.

Appeal from the United States District Court for the District of North Dakota

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is

reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

January 27, 1994

"Let the within judgment be filed and entered in the Clerk's Record."

April 7, 1994 — Dated

/s/ Bruce M. Van Sickle, Senior Judge

A true copy.

Attest: /s/ Michael Gans

Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

MANDATE ISSUED 3/31/94

Supreme Court, U.S.
FILED
JUL 21 1994
OFFICE OF THE CLERK

No. 93-2058

In The

Supreme Court of the United States

October Term, 1994

W.R. GRACE & COMPANY and
W.R. GRACE & COMPANY-CONN.,

Petitioners,

v.

MDU RESOURCES GROUP, doing business as
Montana-Dakota Utilities Co., Inc.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

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COUNTER-STATEMENT ON JURISDICTION

Petitioner's ("Grace") jurisdictional statement is inaccurate. Grace never filed a petition for rehearing with the Eighth Circuit. After Chief Judge Richard Arnold rendered the panel's decision, Grace filed a "Suggestion for En Banc Disposition." The order denying this suggestion also denied a "petition for rehearing by the panel" [A-20] because the Eighth Circuit now treats all in banc suggestions as including petitions for panel rehearing. *See* 8th Cir. R. 35A (c)(4); *Missouri v. Jenkins*, 495 U.S. 33, 50 (1990) (noting merits of such a rule).

COUNTER-STATEMENT OF THE CASE

This is a diversity based product liability action. Respondent ("MDU")[1] claimed at trial that Grace was negligent and strictly liable for putting asbestos in its Monokote fireproofing and for its undisputed failure to warn about the asbestos in Monokote [A-3; Tr. 2288-2289]. Grace claimed that Monokote never injured MDU's property [Petition 6]; that it "had no knowledge that any nonindustrial exposure to asbestos in its products caused any significant health risk" [Petition 6]; and that no asbestos substitute was available at the time of sale [A-3, 14].[2] Grace also raised the North Dakota statute of limitations as an affirmative defense [A-3].

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[1] MDU Resources Group, Inc. is a Delaware corporation traded on the New York Stock Exchange. It has no parent company or partially owned subsidiary. Rule 29.1.

[2] Further background is available in the many decisions involving Monokote, *see, e.g., State Farm Mutual Automobile Ins.*

The liability instructions on what MDU had to prove to recover never asked the jury to determine whether or not Monokote contaminated MDU's building with asbestos fibers. The statute of limitations instruction and special question also failed to ask the jury to determine if or when MDU's property was contaminated or otherwise injured [A-5-6; L-4].

MDU appealed the judgment entered against it. The Eighth Circuit held that the statute of limitations instruction incorrectly stated North Dakota law; that two of the numerous evidentiary errors it cited were not harmless error; and that the District Court allowed Grace's cross-examinations "to get out of hand" when the District Court permitted Grace to try its statute of limitations defense during MDU's case-in-chief [A-6-18].

REASONS FOR DENYING THE WRIT

The "Questions Presented" were not preserved for review, have no basis in fact, and do not meet this Court's Rule 10.1 considerations even if true.

Co. v. W.R. Grace & Co.-Conn., ___ F.3d ___, 1994 WL 189638 (7th Cir. May 17, 1994); *City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975 (4th Cir. 1987); *Clayton Center Assoc. v. W.R. Grace & Co.*, 861 S.W.2d 686 (Mo.App. 1993), and in the decisions certifying nationwide class actions against Grace and others. *See Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177 (4th Cir. 1993); *In Re Asbestos School Litigation*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 & 915 (1986).

I. GRACE FAILED TO PRESERVE ANY OF ITS QUESTIONS PRESENTED

The first "Question Presented" claims that the Eighth Circuit re-examined the jury verdict when the Court made a three sentence reference to the 1988 HTI contamination report and the asbestos levels later found in MDU's building [Petition 9-10, *citing* A-1, 3]. MDU gave record citations to these facts in the opening brief it filed in the Eighth Circuit [Appellant Brief 1]. The Appellee brief Grace filed in the Eighth Circuit never challenged these citations, never suggested that the jury was instructed to determine whether MDU's building was contaminated, and never hinted that the facts MDU cited were inconsistent with the liability verdict.

The second and third "Questions Presented" claim that the instructional and evidentiary errors were harmless [Petition 23-29]. MDU's opening brief gave record citations to the facts which showed the prejudice it suffered from these errors [Appellant Brief 10, 44, 48-49]. Grace's Appellee brief again never presented any evidence or argument that these instructional and evidentiary errors, if error, were harmless.

MDU's reply brief in the Eighth Circuit pointed out Grace's numerous failures to argue harmless error [Appellant's Reply Brief 1].

The idea that the Constitution forbids an appellate court from relying on facts unopposed on appeal is absurd. If Chief Judge Arnold and the other panel members violated the Seventh Amendment by relying on facts Grace failed to dispute, then this Court is likewise guilty every time it applies its Rule 15.1 in a jury case. Rule 15.1

admonishes counsel to raise any perceived misstatements of fact or law

> *in the brief in opposition*, and not later. Any defect of this sort in the proceedings below that does not go to jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition (emphasis in original).

Grace waived all the questions it seeks to present by failing to raise any of them in the Court of Appeals. *See EEOC v. FLRA*, 476 U.S. 19, 24 (1986) (per curiam) (writ of certiorari dismissed as improvidently granted because the issues presented were not raised in the Court of Appeals).

II. GRACE'S CLAIM OF APPELLATE FACT-FINDING IS BASELESS

The Eighth Circuit did not re-examine facts tried by the jury because the jury was never asked to determine whether MDU's property was contaminated, and the facts the Court cited are indeed facts because they were undisputed at trial as well as on appeal.

Grace misstates the record when it says the jury was "specifically instructed to find whether MDU's claim of asbestos fiber release and property contamination made the Monokote defective and unreasonably dangerous" [Petition 7]. The jury never received an instruction or special question which asked it to determine whether MDU's building was contaminated.

The instructions Grace cites to claim otherwise was the "Statement of the Case" instruction which introduced

the parties claims [L-6] and an instruction which introduced MDU's design defect claim that it was "the addition of the asbestos" that made Monokote defective [L-9]. Neither instruction was a liability instruction on what MDU had to prove to recover. The liability instructions on the "essential elements of strict liability," on the definition of "unreasonably dangerous," and on failure to warn never mentioned contamination as a requirement or even as a factor for the jury to consider [Grace's Eighth Cir. Appendix C-0018, C-0019, C-0020]. As the Petition notes, the Eighth Circuit did not hold that contamination was the injury necessary to recover under North Dakota tort law until "several months *after* this jury verdict was entered" [Petition 23 at n. 14 (emphasis in original), *citing Tioga Public School District No. 15 v. U.S. Gypsum*, 984 F.2d 915 (8th Cir. 1993) (ND law)].

Grace's further charge that the Eighth Circuit failed to give the liability verdict sufficient deference [Petition 19] ignores that the verdict is indelibly tainted with trial error.

Besides the evidentiary errors Grace now says are harmless [Petition 27-29], Grace offered into evidence as an exhibit a *Science* article one of Grace's litigation experts co-authored [A-4 n. 2].[3] The article's underlying data was largely generated by defendants as part of defending asbestos building cases, and the article itself is not an original study, but the opinions of the authors on what they believe some of the literature suggests [To

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[3] This "Science" article is the source Judge Bowen cited when he commented on what "most experts" believe [Petition 19 n. 10].

1604-1606]. The article's accompanying media publicity was generated by Grace's alter-ego, the Safe Building Alliance,[4] and drew a number of vigorous responses, including one from the Environmental Protection Agency [Tr. 1608; 1614-1616; 3635-3651].

After the District Court explained to the jury why learned treatises are not admissible as exhibits, *see* Fed.R.Evid. Rule 803(18), it overruled MDU's objection and admitted the *Science* article as an exhibit after it told the jury that the article showed the impact Grace's expert "played in the development of thinking in this area" [Tr. 3205]. The co-author who testified for Grace later admitted that he deliberately destroyed his file on the article so that lawyers could not question him about it [Tr. 3285-3288]. The Eighth Circuit made a point to note that the District Court could reconsider the article's admissibility on remand [A-4 n. 2].

Even more egregious, the District Court also allowed Grace's cross-examinations to "get out of hand" [A-18], broke its assurance to MDU that Grace's cross-examinations would be limited to the scope of direct [A-4], and "prodded MDU to question its witnesses regarding Grace's statute-of-limitations defense" during MDU's case-in-chief [A-5]. Describing the District Court's action as "prodding" was kind. During MDU's case-in-chief, the

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[4] *See In Re Asbestos School Litigation*, 842 F.2d 671, 675 (3d Cir. 1987) (describing alter ego relationship between Grace and the Safe Building Alliance and the Alliance's goal of reducing liability by encouraging building owners to forego asbestos removals).

District Court diverted the jury's attention away from Grace's liability to Grace's statute of limitations defense:

> I would like to get back into the question of the issue of whether or not Montana-Dakota knew or should have known by June 4, 1984 or before June 4, 1984 of the degree of the problem it had because of the asbestos in the building [Tr. 2397].

The District Court later realized that it improperly shifted the burden of proof on Grace's affirmative defense [Tr. 2463-65], noted that a curative instruction was "well advised" [Tr. 2458], yet decided not to give one [Tr. 2504]. No "Question Presented" challenges the Eighth Circuit's holding on this issue.

The contamination facts the Eighth Circuit cited are also established facts because Grace failed to challenge them at trial as well as on appeal.

Grace again misstates the record when it suggests that the 1988 HTI contamination report the Eighth Circuit cited [A-1, 3] was "hotly disputed at trial" [Petition 9]. Grace listed the HTI report as defense exhibit D-671 in its pre-trial exhibit list, never objected when MDU admitted the report into evidence [Tr. 147-48], and never argued at trial that the report showed a lack of contamination. Grace instead used the HTI report in its cross-examinations and in its closing jury argument to argue that MDU's building contained only "trace" contamination [Tr. 287-300; 593-94; 872-77; 4228-4229]. The head of HTI testified that significantly more asbestos would have been found had the 1988 samples been analyzed by the more powerful microscope recommended in a 1989 Environmental Protection Agency draft protocol [Tr. 4024].

Grace also never objected to the introduction of evidence about the costly operation and maintenance program MDU instituted shortly after it received the HTI report in 1988 [Tr. 161]. By the time of trial in 1990, MDU had used this "O & M" plan to decontaminate its building and to institute procedures designed to avoid further asbestos fiber releases pending the fireproofing's removal [Tr. 161-181]. The testimony Grace cites from MDU's President on the lack of contamination concerned the building's condition as of 1990 [Petition 9 n. 3], some two years after MDU began its decontamination procedures.

Grace did raise a now obsolete "*Frye* objection"[5] when MDU offered into evidence the asbestos fiber levels which were later found in the building's settled dust and the levels normal maintenance and custodial activities would have produced had MDU not implemented its O & M plan [A-3 (citing Pl.Ex. 553)]. The District Court overruled the objection because Grace offered nothing to challenge the dust sampling's scientific methodology [Tr. 812]. Grace failed to mention this ruling when it told this Court that the levels the Eighth Circuit cited have "no scientific basis" [Petition 10].

Grace also failed to present any evidence contradicting MDU's dust sampling results. It instead challenged dust sampling *in toto* by arguing that asbestos fibers previously released into the air and later found in settled dust are insignificant. Grace claimed that a building is

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[5] *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. ___, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) has since held that the admissibility of expert testimony is governed by the Federal Rules of Evidence, not the more stringent "*Frye* standard."

not truly "contaminated" unless air sampling shows that asbestos fibers taken directly from indoor air exceed governmental clearance levels [Tr. 4233-37 (closing jury argument)]. Grace repeats the same argument here [Petition 9 n. 3; 10 n. 4] without disclosing the apparently unanimous authority to the contrary.[6]

In sum, there was never a jury determination on contamination for the Eighth Circuit to re-examine and the facts the Court cited are indeed facts because they were unchallenged at trial and on appeal.

III. GRACE'S CLAIM OF HARMLESS INSTRUCTIONAL ERROR IS BASELESS AND CONTRADICTS THE POSITION GRACE HAS TAKEN IN AT LEAST TWO COURTS OF APPEAL.

Besides failing to argue harmless instructional error in its Appellee brief, Grace misstates the record when it says that the Court ignored portions of the statute of limitation instruction [Petition 24]. The Court cited the instruction fully [A-5-6]. Grace's problem is that the three-pronged statute of limitation instruction [A-5-6] and special question [L-4] never asked the jury to determine when MDU's property was injured.

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[6] *See Perlmutter v. United States Gypsum Co.*, 4 F.3d 864, 868 (10th Cir. 1993) (asbestos "contamination" found in surface dust located on top of display case and on carpeting); *Tioga Public School*, 984 F.2d at 917-919 (citing dust samples to find "contamination"); *City of Greenville*, 827 F.2d at 979-980 (citing "contamination" found on top of computer surfaces).

Under governing state law, a compensable injury must occur and manifest itself before the statute of limitations can begin to run [A-7-8, *citing Wall v. Lewis*, 366 N.W.2d 471, 473 (N.D. 1985)] and, as Grace notes, the Eighth Circuit held that the injury which must occur and manifest itself is that MDU's building *"had been* contaminated" [Petition 27, *citing* A-11 (emphasis in Petition)].[7] The "Questions Presented" do not challenge this North Dakota accrual standard.[8]

Grace also defines the injury to property as actual contamination when it suits its purposes. To contest class certification, Grace told the Fourth Circuit that a "claim that may be heard in diversity exists only when there is product-caused 'contamination' producing damage exceeding the jurisdictional minimum" [Appellant Reply Addendum 4-5 (excerpt from Appellant brief Grace filed in *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177 (4th Cir. 1993)]. To extend its insurance coverage over several policy periods, Grace more recently told the Second Circuit that the courts "almost always rule" that the injury which is recoverable in tort and which triggers the statute of limitations is "fiber release, years after installation" [MDU's Response to In Banc Suggestion, Ex. A

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[7] This is in accord with the overwhelming authority. *See, e.g., Clayton Center Assoc., supra; May v. AC & S, Inc.*, 812 F.Supp. 934 (E.D. Mo. 1993); *State Farm Mutual Automobile Ins. Co. v. W.R. Grace & Co-Conn.*, 834 F.Supp. 1046 (C.D. Ill. 1992) and cases cited therein at 1048-1049.

[8] While Grace criticizes this state law standard [Petition at 26-27 and n. 16], "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." Rule 14.1(a).

15-16 (excerpt from brief Grace filed in support of its Petition for Rehearing in *Maryland Casualty Ins. Co. v. W.R. Grace & Co.*, 4 F.3d 155 (2d Cir. 1993), *amended on rehearing* 1993 W.L. 658199, in banc rehearing denied (July 15, 1994)].

There is, of course, a vast difference between learning that a defendant may be "possibly liable" because its product "might pose a hazard" [A-5-6] and learning that you have been injured. *United States v. Kubrick*, 444 U.S. 111 (1979) drew an identical distinction when it held that it is the discovery of an injury and its cause – not the discovery of possible liability – that triggers the Federal Tort Claims Act's statute of limitations. MDU's opening brief in the Eighth Circuit made this same point when it noted that the erroneous instruction allowed the jury to find that MDU's claims were time barred before MDU was injured and could have brought suit [Appellant Brief 10].

Grace's suggestion that MDU's closing jury argument somehow cured this instructional error elevates MDU's counsel to the level of law-giver and ignores controlling state law. This Court cannot infer a "defect in [MDU's] proof rather than a defect in the trial court's instruction" [Petition 25] because, in North Dakota, it is the defendant who has the burden of proof on a statute of limitations defense. *McCarter v. Pomeroy*, 466 N.W.2d 562 (N.D. 1991).

The suggestion further ignores the additional prejudice MDU suffered when Grace presented evidence on MDU's size to ostensibly show when MDU should have known that Monokote "might pose a hazard." The Eighth

Circuit cited just some of the evidence improperly admitted under the erroneous instruction [A-5 n. 3].

IV. GRACE'S CLAIM OF HARMLESS EVIDENTIARY ERROR IS BASELESS

Besides failing to argue harmless evidentiary error in its Appellee brief, Grace takes the Eighth Circuit to task for "effectively nullifying" the harmless error statute [Petition 29] when the Court actually applied the standard established in *Kotteakos v. United States*, 328 U.S. 750 (1945). *Kotteakos* held:

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand . . . . *But if one cannot say, with fair assurance,* after pondering all that happened without stripping the erroneous action from the whole, *that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.* The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. *Id.* at 765 (emphasis supplied).

This "cannot say" harmless error standard is identical to the one the Eighth Circuit applied [A-17-18].[9]

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[9] Grace's claim that it failed to find any precedent "enunciating such a relaxed standard" is remarkable [Petition 29 n. 17]. *Kotteakos* is the bedrock for this Court's harmless error jurisprudence, and Grace cited *McDonough Power Equipment v.*

Grace also misstates the record when it suggests that the Court found that the exclusion of P-83A warranted a new trial simply because it "could not say" it was harmless [Petition 28-29]. The Eighth Circuit went on to note that what Grace knew and when it knew it was critical to MDU's failure to warn claims [A-17-18].

It was undisputed at trial that Grace never warned MDU about the asbestos in Monokote [Tr. 2288-2289]. The negligence instruction on duty to warn instructed that a manufacturer's duty is "in proportion with its actual knowledge of the risks" at the time the product was manufactured and sold [Appellant's Eighth Cir. Addendum 11]. The strict liability instruction on duty to warn similarly instructed that Grace "had to anticipate a danger" before its failure to warn rendered the product defective [Grace's Eighth Circuit Appendix C-0017].

Grace claimed at trial that "it had no knowledge that nonindustrial exposure to asbestos in its products caused any significant health risk" [Petition 6]. P-83A, entitled "Asbestosis," shows that Grace's insurance carrier warned Grace's Safety Administrator about the relationship between cancer and the exposure to asbestos-containing building materials after the materials are used in buildings [A-4]. The District Court initially admitted the exhibit [Tr. 2432-2434], but reversed itself after Grace presented extensive argument and evidence devoted to the exhibit, including a deposition, taken during trial, of Grace's records custodian [Tr. 1310-1342; 1637-1639;

Greenwood, 464 U.S. 548 (1984) [Petition 21-22] which in turn cited *Kotteakos. McDonough*, 464 U.S. at 553.

1730-1731; 2415-2451; 2481-2490]. During these arguments, the District Court described the warning Grace received from its insurance carrier as "a pretty critical piece of paper" and noted that it "establishes a level of knowledge" that "throw[s] a cloud on the position of W.R. Grace" [A-17, *citing* Tr. 2422, 2440, 2445].

Grace understandably devotes little attention to the exclusion of MDU's feasibility evidence. The feasibility of an alternative safer design has been called the "very heart" of a design defect case, *see* Annot., *Burden of Proving Feasibility of Alternate Safe Design in Product Liability Action Based on Defective Design*, 78 A.L.R.4th 154, 157 (1990), and, under the governing state law, whether or not Grace could have replaced the asbestos in Monokote without impairing the product's usefulness was a primary consideration in MDU's claim that the "addition of asbestos" made Monokote defective [L-9]. *Spieker v. Westgo, Inc.*, 479 N.W.2d 837, 841 (N.D. 1992).

Grace presented testimony at trial that it was impossible to make an asbestos-free Monokote at the time it sold the asbestos fireproofing to MDU in 1968 [A-3, 14]. In rebuttal, MDU offered evidence that Cellufloc – the substitute Grace actually used in the asbestos-free Monokote it developed in 1973 – had been available since 1943 [A-3-4 and n. 1; 14-15 and n. 11]. MDU also had its expert make an offer of proof on this same point [Tr. 1163-1164], but the District Court excluded any evidence showing that the asbestos substitute Grace actually used in 1973 was available in 1968 [A-14 and n. 11].

V. NONE OF THE RULE 10.1 CONSIDERATIONS ARE PRESENT EVEN IF GRACE'S ALLEGATIONS ARE ALL TRUE

This diversity case presents no federal question. Grace cites no conflict among the federal Circuit Courts of Appeal. Grace instead wants this Court to say that Chief Judge Arnold and the other panel members "so far departed from the accepted and usual course of judicial proceedings" that this Court should exercise its supervisory power. Rule 10.1(a). Even if Grace preserved this allegation (it did not), and even if an exercise of this Court's supervisory power would otherwise be warranted (it is not), this case is not one to decide the questions Grace presents.

Grace even now does not dispute that the District Court allowed its cross-examinations to "get out of hand," permitted it to try its statute of limitations defense during MDU's case-in-chief [A-18], and actually "prodded" MDU to question its witnesses about the affirmative defense during MDU's liability presentation [A-5]. It was these improper cross-examinations (with the District Court's "prodding") which allowed Grace to claim in MDU's case-in-chief that the statute of limitations had run, yet then turn around and schizophrenically claim during its own case-in-chief that MDU's property was never injured [A-12 n. 9].

The liability and statute of limitation verdicts are so tainted with this undisputed error that no decision on the "Questions Presented" could effect MDU's right to a new trial. As Grace aptly notes, the harmless error statute

applies to all federal appellate courts, including this Court [Petition 22].

CONCLUSION

The "Questions Presented" were not preserved, have no basis in fact, and do not warrant this Court's attention. The Petition should be denied.

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